

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Lincoln Alexis, d/b/a Alexis Painting Company and Maurice Richard and Wilbert Mitchell and Richard Mitchell and Earin Garner. Cases 15–CA–16923, 15–CA–17024, 15–CA–17148, 15–CA–17151

September 16, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS WALSH
AND MEISBURG

On March 31, 2004, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions, and the General Counsel filed an answering brief.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³

¹ In his answering brief, the General Counsel moved to strike the Respondent's exceptions, asserting a failure to conform to Sec. 102.46(b) of the Board's Rules and Regulations. Although the Respondent's exceptions do not conform in all respects to the Board's Rules, they are not so deficient as to warrant striking, particularly in light of the Respondent's pro se status. See *Budget Heating & Air Conditioning*, 333 NLRB 199 fn. 2 (2001), quoting *A.P.S. Production/ A Pimental Steel*, 326 NLRB 1296, 1297 (1998) ("The Board typically has shown some leniency toward a pro se litigant's efforts to comply with our procedural rules.").

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3rd Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ For the following reasons, we agree with the judge's conclusions that the Respondent violated Sec. 8(a)(3) and (1) of the Act by laying off employees Maurice Richard, Wilbert Mitchell, and Richard Mitchell, that the Respondent violated Sec. 8(a)(4) and (1) by laying off Richard Mitchell, and that the Respondent violated Sec. 8(a)(1) by discharging employee Earin Garner. On the basis of the credited testimony, the General Counsel made a showing of unlawful motivation by proving the employees' protected activity, the Respondent's knowledge of this activity, and the Respondent's animus against the employees' protected conduct. Thus, we agree with the judge that under *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel established by a preponderance of the evidence that protected activity was a motivating factor in the layoff and discharge decisions. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB No. 124, slip op. at 4 (2004). On the basis of the credited testimony, we further agree with the judge that the Respondent did not meet its *Wright Line* burden of "demonstrating that the same

and to adopt the recommended Order as modified⁴ and set forth in full below.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Lincoln Alexis d/b/a Alexis Painting Company, Metairie, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their union and protected concerted activities and those of their fellow employees.

(b) Threatening its employees with termination because of their union and protected concerted activity.

(c) Threatening to refrain from transferring employees to another jobsite because of their union and protected concerted activity.

(d) Instructing its employees not to discuss their wages.

(e) Interfering with Board process by seeking information from its employees regarding ongoing Board actions and threatening its employees if they withhold such information.

(f) Laying off employees because of their union and protected concerted activity or to discourage employees from engaging in union or protected concerted activity.

(g) Discharging employees because of their protected concerted activity.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Maurice Richard, Wilbert Mitchell, Richard Mitchell, and Earin Garner full reinstatement to their former positions, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089.

⁴ We agree that the Respondent's seeking of information concerning employee resort to the Board, and the Respondent's threat of discharge if the information were not supplied, violated Sec. 8(a)(1). We do not pass on whether the conduct also violated Sec. 8(a)(4), inasmuch as that additional violation would not materially affect the remedy. We shall modify the judge's recommended Order to conform to the violations found and in accordance with our decisions in *Ferguson Electric Co.*, 335 NLRB 142 (2001), *Excel Container, Inc.*, 325 NLRB 17 (1997), and *Indian Hills Care Center*, 321 NLRB 144 (1996).

(b) Make Maurice Richard, Wilbert Mitchell, Richard Mitchell, and Earin Garner whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs of Maurice Richard, Wilbert Mitchell, and Richard Mitchell, and the unlawful discharge of Earin Garner, and within 3 days thereafter notify them in writing that this has been done and that the unlawful layoffs and discharge, respectively, will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Metairie, Louisiana, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 3, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 16, 2004

Robert J. Battista,	Chairman
---------------------	----------

Dennis P. Walsh,	Member
------------------	--------

Ronald Meisburg,	Member
------------------	--------

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT interrogate our employees about their union and protected concerted activities and those of their fellow employees on behalf of the International Union of Painters and Allied Trades, District Counsel 80.

WE WILL NOT threaten to refrain from transferring our employees to another job site because of their union and protected concerted activity.

WE WILL NOT threaten our employees with termination because of their union and protected concerted activity.

WE WILL NOT instruct our employees not to discuss their wages.

WE WILL NOT interfere with Board process by seeking information from our employees regarding ongoing Board actions and threatening our employees if they withhold such information.

WE WILL NOT lay off our employees because they engaged in union or protected concerted activity or to discourage employees from engaging in union or protected concerted activity.

WE WILL NOT discharge our employees because they engaged in protected concerted activity.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer Maurice Richard, Wilbert Mitchell, Richard Mitchell, and Earin Garner full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Maurice Richard, Wilbert Mitchell, Richard Mitchell, and Earin Garner whole for any loss of earnings and other benefits resulting from our discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of Maurice Richard, Wilbert Mitchell, and Richard Mitchell, and the unlawful discharge of Earin Garner, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful layoffs and discharge, respectively, will not be used against them in any way.

LINCOLN ALEXIS, D/B/A ALEXIS PAINTING
COMPANY

Beauford D. Pines, Esq., for the General Counsel.
Lincoln J. Alexis Jr., pro se, for the Respondent.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard by me on February 17, 2004, in New Orleans, Louisiana. The four cases are based on four separate charges filed by Maurice Richard, an individual in Case 15-CA-16923, by Wilbert Mitchell, an individual in Case 15-CA-17024, by Richard Mitchell, an individual in Case 15-CA-17148, and by Earin Garner, an individual in Case 15-CA-17151. The cases were consolidated for trial by the Acting Regional Director of Region 15 of the National Labor Relations Board (the Board). The consolidated complaint alleges that Lincoln Alexis, d/b/a Alexis Painting Company (Alexis Painting or the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by interrogating its employees concerning their engagement in protected concerted activities and the engagement or their fellow employees in protected concerted activities. The complaint also alleges violations of Section 8(a)(1) of the Act were committed by Respondent by the issuance of unlawful threats to employees for their participation in protected concerted activities and by instructing its employees not to discuss their wages and by informing its employees that their employment was being terminated because of their union activities. The complaint also alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by its layoffs of the Charging Parties,

Maurice Richard and Wilbert Mitchell, and violated Section 8(a)(3), (4), and (1) by its layoff of Richard Mitchell, and that Respondent violated Section 8(a)(4) and (1) by interrogating its employees about ongoing Board cases, and by threatening them with termination if they did not provide Respondent with information regarding ongoing Board cases, and that Respondent violated Section 8(a)(1) of the Act by its discharge of Charging Party Earin Garner. The Respondent has, by his answer, denied the commission of any violations of the Act.

On the entire record including my observation of the demeanor of the witnesses and after considering the briefs filed by the parties, I make the following findings of fact and conclusions of law.

I. THE BUSINESS OF THE RESPONDENT

The complaint alleges, Respondent admits and I find that at all times material herein for the 12-month period prior to the issuance of the consolidated complaint. Lincoln Alexis, d/b/a Alexis Painting Company has been engaged in commercial and residential painting with his office and place of business at his facility located in Metairie, Louisiana. The complaint also alleges, Respondent admits and I find that at all times material herein, Respondent has been owned by Lincoln Alexis, a sole proprietorship doing business as Alexis Painting Company and has been engaged as a painting subcontractor, that annually, Respondent in conducting its business operations provided services valued in excess of \$50,000 for Broadmoor L.L.C. (Broadmoor), an enterprise within the State of Louisiana, that Broadmoor, at all material times has been engaged as a construction contractor, that annually Broadmoor, a Louisiana Corporation, in conducting its business operations purchased and received at its Louisiana facility and jobsites, goods valued in excess of \$50,000 directly from points outside the State of Louisiana and that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent admits and I find that at all material times, the International Union of Painters and Allied Trades, District Council 80 (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

The complaint also alleges, Respondent admits and I find that at all material times, Lincoln Alexis, vice president and Dieon Austin, supervisor, have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act.

FACTS

Respondent, Alexis Painting, has operated as a nonunion painting contractor for over 20 years. Respondent entered into a subcontract with Broadmoor to do the outside painting work at the New Orleans Louis Armstrong International Airport (Airport). Broadmoor is a general contractor and had been given the airport project. Broadmoor entered into a project agreement for the airport job under which Broadmoor agreed with various unions, including the International Union of Painters and Allied Trades, District Council 80 (the Union) to employ employees who become members of the Union. Pursuant to that agreement

Respondent entered into a "Memorandum of Understanding" with the Union on October 10, 2002. Under the terms of this agreement Respondent agreed that he is a party to a collective-bargaining agreement with the Union until the completion of the job. Under the terms of the memorandum of understanding Respondent agreed to be bound by the collective-bargaining agreement entered into between the Union and the Respondent, "including but not limited to provisions covering wages, working conditions, and fringe benefits, or the existing collective bargaining agreement by and between the Union and its employers effective until completion of job." The collective-bargaining agreement set commercial wage rates for journeyman painters, paperhangers, sheet rock tapers, and floaters at \$14.04 per hour from April 1, 2002, through March 31, 2003. It also provided for show-up pay and that "five (5) eight hour days or four (4) ten (10) hour days shall constitute a weeks work. Forty hours shall constitute a week's work beginning with Monday at 7:00 A.M. through Saturday 6: A.M." It also provided that Saturday work shall be paid at the rate of time and one half with work on certain holidays to be paid at the rate of double time.

Much of the testimony elicited by the General Counsel from the witnesses including that admitted to by Lincoln Alexis on the stand was uncontroverted. As set out in the General Counsel's brief, Respondent contracted with Broadmoor, a general contractor, to paint the long term parking structure at the airport. Broadmoor executed a project agreement with several labor organizations, including the Union for all construction work to be performed at the airport with limited exceptions. Article 6 of the project agreement provides that the signatory unions are recognized as the sole source of employment referrals for all onsite construction work covered by the agreement. All employees who worked on this project were required to register with a signatory union and obtain a job referral. Article IX of the project agreement sets out the hours of work, a 30-minute lunch period and overtime pay for all hours worked in excess of 8 hours per day. Respondent's employees worked a 7 a.m. to 3:30 p.m. shift at the airport and were entitled to a lunch period from 12 to 12:30 p.m. Article X of the project agreement provides for employees to receive 2 hours show-up pay for reporting to work if no work is available. Article XI of the agreement provides that employees shall be paid prior to the end of their shift on the designated payday which was Friday for Respondent's employees.

In spite of having bound itself to the applicable provisions of the memorandum of understanding and to the provisions contained in the Union's area contract, the testimony of employees and alleged discriminatees Maurice Richard, Wilbert Mitchell, Richard Mitchell, and Earin Garner which was in part undisputed by Respondent, establish that Respondent largely ignored the contractual obligations it had undertaken. Alexis required his employees to be at the airport by 8 a.m. but Alexis regularly did not arrive at the job until 10 or 11 a.m. The testimony of these employees established that they were unable to start work until they received instructions from Alexis, and thus, were required to wait for his arrival to start to work. They were not paid show-up time as contractually required. Respondent stipulated there was work available on this project until at least No-

vember 16, 2003. Respondent also had work to perform at a Sears store in Gautier, Mississippi, and had contracts with Sears to provide exterior painting for stores in Louisiana and Mississippi which was to be performed during February to May 2003. The employees were not paid overtime for hours worked in excess of 8 hours per day. They were also not permitted to take lunch at the contractually provided time of 12 noon. They were also not regularly paid the union rate of \$14.04 per hour for journeyman painters. They were not paid prior to the end of their shifts on Fridays as contractually required, but were not paid until the following Saturday or later. They were not given statements of earnings and sometimes were paid in cash with no regularity of the amount of their pay. Having failed to pay his employees the contractually required rate of pay on Fridays as required, the Respondent made them loans to tide them over which were to be repaid at such times as Alexis might belatedly pay them. Respondent Alexis attempted to deflect the effects of his failure to timely and accurately pay these employees by the end of their shift on Fridays and otherwise comply with Respondent's contractual obligations by asserting that he sometimes bought lunch for the employees. This attempted defense to the complaint allegations is irrelevant to the issues of Respondent's failure to comply with its contractual obligations.

Respondent's employees became dissatisfied with their treatment by Alexis and they complained to the Union whose business representative, Ray Laux, met with some of the employees and Alexis. The union representative told Alexis he needed to comply with the agreement and warned him not to retaliate against the employees. Alexis agreed to comply, but instead singled out Maurice Richard, Wilbert Mitchell, and Richard Mitchell who had complained to the Union about Alexis' failure to comply with the agreement and laid them off with negative comments on their having engaged in protected concerted activities by making complaints against Alexis' treatment of the employees.

Respondent brought employees who he had selected for hire to the Union's offices where they signed authorization cards to join the Union and were issued referral slips by the Union to Respondent's job on the airport project. Wilbert Mitchell had 28 years experience as a painter and a 10-year work experience with Respondent. He worked for Respondent on residential projects and commercial projects including work on Sears's projects in Mississippi. Wilbert had painted the residence of Alexis and had shared a motel room with Alexis when he worked on projects outside the New Orleans area. Wilbert went to the union hall, and signed the union authorization card, and received a referral slip to the airport project on October 11, 2002. He was one of the first employees hired for this project. Wilbert testified he became dissatisfied regarding wages and conditions on the airport project as employees were not receiving show-up pay and were not receiving the correct hourly and overtime rate. On some days the employees reported to work but could not work because Alexis did not show up. He addressed these concerns to Alexis.

Maurice Richard who had 5 years experience as a painter went to the union hall on January 13, 2003, and signed a union authorization card and received a referral slip to work at the airport. He performed trim work at the airport. He received a

pay raise. Approximately a week after Maurice started work at the airport he asked Alexis why he was required to work 10 hours per day, but was only paid for 8 hours. Alexis told him that Respondent did not pay for 10-hour shifts. Maurice discussed this with his coworkers and found that they were also dissatisfied with working conditions at the airport.

Richard Mitchell who has almost 20 years experience as a painter was referred to Respondent by his brother, Wilbert, and worked for Respondent at a Sears in Kenner, Louisiana. On February 19, 2003, Richard went to the union hall and signed a union authorization card and received a referral for the airport project.

Earin Garner who has worked as a painter most of his life, went to the union hall on March 19, 2003, and signed a union authorization card and received a referral for airport project. At that time he was told he would receive his pay on Fridays prior to the end of the workday.

The employees were not satisfied with their terms and conditions of employment at the airport project. Alexis learned that Wilbert Mitchell had complained about not receiving show-up pay and not being paid on Fridays. About March 3, 2003, Alexis told Wilbert that the employees seemed upset and asked Wilbert if he would help him as the employees respected Wilbert. He also asked Wilbert if he had gone to the Union and told Wilbert that he did not want the Union to know his business. Later that day or the next day Alexis asked Wilbert if he was sure that he had not gone to the Union.

On approximately Wednesday, March 5, 2003, Wilbert and Richard Mitchell went to the union hall and met with Business Representative Herman Laux. They told him employees were not receiving show-up pay, lunch at 12 p.m., or their paycheck prior to the end of the workday on Fridays. On Thursday, March 6, 2003, Laux visited the employees at the airport project to investigate the complaints. Laux met with and inquired of the employees whether they had check stubs, W-2 forms or other documentation showing their correct pay. None of the employees were able to produce documentation, as they were not getting paid with checks. Laux told the employees, that they were entitled to show-up pay, a lunch period at noon, and their paychecks by 3 p.m. on Fridays. Alexis arrived at the project while Laux was there and Laux told Alexis he was "f---king these guys out of their money" and that the Union was going to get to the bottom of this matter. After Laux left, Alexis told the employees, "[N]ow if anybody asks you what you make, you tell them \$14.08 an hour, nothing more and nothing less."

Union Representative Ray Schlaudecker testified he met with Alexis, on Friday, March 7, at the union hall to discuss the Respondent's failure to follow the contractual rules with respect to show-up time pay, lunch periods, and payday. Alexis told him he would correct the problems. However, on the same day (March 7), Respondent failed to pay employee Maurice Richard for work he performed that week. On the following day (March 8), Alexis told Maurice he did not have the money to pay him but he would loan Maurice \$100 and then required Maurice to sign a loan agreement for this amount instead of paying Maurice for the work he had performed.

On Monday, March 10, Alexis told all the employees to wash cars because paint had blown over several cars. Wilbert

Mitchell declined as he was recovering from the flu and did not want to get wet. Alexis told him to leave and he did so. On the same day employees Maurice Richard, Ray Hampton, and Dieon Austin met with Union Representative Schlaudecker and told him they were not receiving show-up pay. Alexis telephoned Schlaudecker who told him that none of his employees had come to the union hall. Schlaudecker told the employees to contact him if Alexis gave them any problems. As they left the union hall the employees observed Alexis in his truck outside where he observed them leaving the union hall. Alexis called them over to him and asked them what they were doing. The employees were fearful of retaliation and told Alexis they had been told to go to the Union and file a grievance but had not filed a grievance. At that point Schlaudecker came out of the hall and told Alexis the employees had come to the hall and met with him because they had problems to be resolved. He asked Alexis into the hall to discuss the problems and Alexis and the employees met with Schlaudecker who told Alexis to write the employees' problems down so they could be corrected. Alexis told them to tell him of the problems. They told him of their dissatisfaction with Respondent's failure to give them show-up time pay, overtime pay, and having to wait until 1 to 3 p.m. to take lunch. Maurice also told Alexis he was tired of not receiving his weekly pay until Saturdays, Sundays, and Mondays which he had earned in the prior week rather than on Fridays as required by the Union's area contract and project agreement. Alexis told Schlaudecker he had purchased lunch for the employees. Schlaudecker told him the employees were still entitled to a lunch period between 12 and 12:30 p.m. He also told Alexis to make sure that the employees were not harmed for coming to the Union with their problems. That evening Alexis telephoned Maurice at home and told him he was a good worker, and very reliable but that he was not going to permit him to work. Alexis said, "I'm not going to be needing you no more. I'm not going to be working you over at the Airport nor either [at] Sears because you talk too much. You're hurting me and I have to set an example for guys that's going down to the Union on me." At the hearing Alexis contended that Maurice Richard was laid off because he was not needed at the airport and did not have the skills to work at Sears.

On Wednesday, March 12, Alexis called Wilbert at his house and asked if he was going to return to work. Wilbert said they needed to discuss the pay scale before returning to work. Alexis then said he would call him back and did so 15 minutes later. He then told Wilbert, "I don't think its going to work out because I need people out there that I can trust. I don't need people out there that's going to be going to the Union every time they have a beef." At the hearing Alexis stated that Wilbert was laid off because he did not trust him. Subsequently on Friday, March 14, Wilbert and Richard Mitchell met Alexis at a Circle K (a gas station) to receive their paychecks. Alexis told them that the employees he could trust not to go to the Union would work at a Sears in Jackson, Mississippi, but that he would not take employees he could not trust.

On March 18, Respondent hired five employees to work at the airport. On March 19, Respondent hired three employees including Earin Garner to work at the airport. Garner was paid on Friday, March 21, for work he performed during that week.

Garner did not report to work on Monday, March 24, because of rain. He testified he had been told by Alexis to come to work when the rain stopped. Garner reported for work on Tuesday, March 25, as the rain had stopped and he had not received any message telling him not to return to work. When he arrived he noticed that three other employees were working. None of them knew what Garner's assignment was that day and they attempted to call Alexis but Garner was unable to speak to Alexis until 4 hours later. Alexis asked Garner why he had reported to work and Garner told him, that he (Alexis) had told him to come to work when the rain stopped. Alexis told Garner to leave the airport and said he would call him. On Wednesday, March 26, Garner called Alexis and asked if he would be paid for the time he had worked. Alexis said he would receive show-up pay but would not be paid for the hours he worked. Garner called Alexis on Thursday, March 27, and asked him if he would get paid on Friday. Alexis told him to call at noon on Friday, March 28. Garner did so and was told by Alexis to call at 3 p.m.. Garner did so and was told by Alexis to call him back at 5 p.m. Garner called at 5 p.m., 7 p.m., and 8 p.m., but on each occasion Alexis did not answer the phone. He finally reached Alexis at 9 p.m. Garner told Alexis he needed his money to pay a bill. Alexis told him, "[I]f I pay you tonight, I'm not going to need you anymore." At 10 p.m. that evening employee Roy Hampton came to Garner's house and handed him a check postdated for March 29, for \$43 and two one-page letters. One letter states that Garner was "paid in full not to return to job site." The second letter states that Garner was not permitted to return to the airport as an employee. On the next day, March 29, Alexis called Garner and told him he would be arrested if he returned to the airport. A day or two later, Alexis called Garner and told him he was a good worker and would get with him in about 2 months when Garner resolved his situation, but did not specify what situation he was referring to. Garner later called Alexis and told him he wanted to come back to work. He was not permitted to return to work. Alexis contended at the hearing that Garner was terminated because he was insubordinate by reporting to work when he had been instructed not to come to work. Between March 31 and June 6, Respondent hired four employees for the airport job.

In July 2003, Alexis took Richard Mitchell to lunch and showed Richard a copy of the charge filed by his brother Wilbert in Case 15-CA-70724 and a copy of the consolidated complaint dated June 2. He asked Richard if he knew anything about these documents or what his brother was doing. Respondent did not present any testimony or other evidence to refute Richard's testimony but contended that he had never had a conversation with Richard about Wilbert. Richard also testified that in July 2003, Alexis called him at home about 20 times between 6:30 and 7 p.m., and on each occasion asked Richard if he was sure he had not spoken to Wilbert or knew what Wilbert was doing. Alexis did not advise Richard that he was not required to answer the questions nor that he would not suffer any reprisals if he refused to answer the questions. Respondent did not present any evidence to dispute Richard's testimony.

Additionally in July 2003, Richard was approached by Alexis and Dieon Austin while he was working at the airport.

Alexis told Richard that Austin was the supervisor and then said, "Richard, I don't want any problems on the job. If anything goes down, I am going to have to lay you off or if I think you are sabotaging my job, I will have to fire you." Alexis also told Richard he would be terminated if he was withholding information. This testimony of Richard was not disputed by Alexis who failed to present any evidence to refute it.

Dieon Austin informed Richard on a Wednesday in July 2003, that Respondent was going to pay the employees on Saturday whether they liked it or not. The following day, Thursday, Richard asked Alexis if this was true. Alexis said it was true because the employees did not want to work on Saturday. Richard told Alexis it was against the law to fail to pay the employees on Friday. The next day (a Friday), Alexis paid the employees. When he gave Richard his check, he told him he was laid off due to budget cuts.

Two or three weeks later in August 2003, Alexis called Richard to return to work at the airport. When he arrived at the airport Alexis told him he did not want him talking to anyone and that he would be terminated if there was any kind of "static" on the job. Richard told Alexis he just wanted to do his job and be paid. After his second day back on the airport job Alexis called Richard and asked him how Broadmoor had found out about his business with Wilbert. Richard said he did not know. He then asked Richard what other charges Wilbert had filed. Richard said he did not know. Alexis said it was a problem so he had to lay Richard off. He then asked Richard if he were going to join the bandwagon and file charges with the Board. Richard said he would do what he had to. Respondent contends that he no longer needed Richard in July and had only needed him for a day in August to do some finish work at the airport. Respondent hired Gary Matthews on August 18 and Derrick Domino on September 18 to work at the airport.

Analysis

As the General Counsel stated in his opening statement, this case is about the failure of the Respondent to follow the terms of the contractual obligations it had undertaken and its determination to rid itself of any employees who questioned his failure to abide by these contractual obligations. In pursuing this course of conduct, Respondent unlawfully interrogated and threatened its employees and ultimately laid them off or discharged them in retaliation for their assertion of their rights under the terms of the contract. I credit the testimony of Maurice Richard, Wilbert Mitchell, Richard Mitchell, and Earin Garner as set out above. The evidence is clear that Respondent not only interrogated and threatened them and terminated them in violation of their rights under Section 7 of the Act, but made it abundantly clear to his employees that these actions were taken against them because of their attempts to seek the help of the Union in protecting their rights as set out in the contract and as provided by Section 7 of the Act. I did not find Alexis to be a credible witness and to the extent that there are conflicts in his testimony and that of the aforementioned employees, I credit their testimony over that of Alexis. I note also that much of the circumstances in which Alexis took adverse actions against these employees were not in dispute. In answer to the allegations that he failed to pay the employees the hourly rates

of pay set out in the contract and to pay overtime for time worked in excess of 8 hours per day and that he failed to pay them show-up time and pay them prior to the end of the day on Fridays as required by the contract, Alexis sought to deflect these allegations by his assertions that he bought lunch for the employees and lent them money. These contentions by Alexis do not in any way rebut the testimony presented by the General Counsel, which was that Alexis did not follow the contract he had agreed to, by paying the employees the hourly rate of pay, overtime, show up time, time and a half for overtime and paying them weekly on Friday afternoons on working time, as set out in the contract. Supervisor Dieon Austin did not testify.

I thus find that Respondent violated Section 8(a)(1) of the Act by the interrogation of and threats issued to its employees, and by its instructions that the employees not discuss their wages. I find that Respondent violated Section 8(a)(3) and (1) of the Act by its layoffs of Maurice Richard and Wilbert Mitchell and violated Section 8(a)(3), (4), and (1) of the Act by its layoffs of Richard Mitchell and violated Section 8(a)(4) and (1) of the Act by its interrogation of employees as to whether the employees had resorted to seeking the protection of the Board and what they had disclosed to the Board and by threatening them with termination if they withheld information, all of which was clearly interference with Board process and the employees' rights under the Act. I find that Respondent violated Section 8(a)(1) of the Act by the discharge of employee Earin Garner.

It is clear that Garner engaged in protected concerted activity when he demanded to be paid on Friday, March 28, for his work on the previous Tuesday which was consistent with the union contract which set out the terms of the employment relationship. Garner's insistence that he be paid on the Friday afternoon was a reasonable invocation of the collectively bargained right and was protected concerted activity. *Interboro Contractors*, 157 NLRB 1295 (1966); *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); *Lorac Construction Services*, 318 NLRB 1034 (1995), citing *NLRB v. City Disposal Systems, Inc.*, at 840 supra, where the Court held that, "as long as the nature of the employee's complaint is reasonably clear to the person to whom it is communicated and the complaint does, in fact, refer to a reasonably perceived violation of the collective bargaining agreement, the complaining employee is engaged in the process of enforcing the agreement."

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Board set forth its causation test for cases alleging violations of the Act that turn, as does the instant case, on employer motivation. Initially the General Counsel must establish that antiunion motivation was a factor in the challenged employer conduct or decision. The burden then shifts to the employer to prove that it would have taken the same action even in the absence of the employees' engagement in protected concerted activity. See *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996). In order to establish a prima facie case the General Counsel must demonstrate by the preponderance of the evidence that (1) the employee was engaged in protected concerted activity; (2) the employer was aware of the activity; (3)

the activity was a substantial or motivating reason for the employer's action; and (4) there was a causal connection or nexus between the employer's animus and its discharge decision.

Applying the aforesaid principles of law, I find that the General Counsel has established a prima facie case in each of the cases, that Respondent's antiunion animus was a motivating factor in Respondent's layoffs and discharge of these employees, and that Respondent has failed to rebut the prima facie case by the preponderance of the evidence as Respondent has not established that he would have laid off or discharged these employees in the absence of the unlawful antiunion animus.

CONCLUSIONS OF LAW

1. Respondent Lincoln Alexis d/b/a Alexis Painting Company is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by its unlawful interrogation of its employees who went to the Union concerning their wages and hours and other terms and conditions of employment and by instructing them not to discuss their wages.

4. Respondent violated Section 8(a)(1) of the Act by threatening its employees with termination and with refusal to transfer them to additional projects because of their resort to the Union.

5. Respondent violated Section 8(a)(4) and (1) of the Act by interfering with Board process by seeking information as to whether its employees had resorted to the Board and threatening its employees with termination if they withheld the information.

6. Respondent violated Section 8(a)(3) and (1) of the Act by laying off its employees Maurice Richard and Wilbert Mitchell, because of their engagement in protected concerted activity.

7. Respondent violated Section 8(a)(3), (4), and (1) of the Act by laying off employee Richard Mitchell because of his engagement in protected concerted activity.

8. Respondent violated Section 8(a)(1) of the Act by its discharge of employee Earin Garner because of his engagement in protected concerted activity.

9. The above unfair labor practices in conjunction with Respondent's status as an employer affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that Respondent has violated Section 8(a)(1) of the Act, it shall be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Respondent, having discriminately laid off Maurice Richard, Wilbert Mitchell, Richard Mitchell, and discharged Earin Garner shall be ordered to offer them reinstatement to their former positions, or if those positions no longer exist, to substantially equivalent positions and make them whole for any loss of earnings and benefits they sustained as a result of the unlawful discrimination against them less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus

interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

Respondent Lincoln Alexis d/b/a Alexis Painting Company, Metairie, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their engagement in protected concerted activities and those of their fellow employees on behalf of the Union.

(b) Threatening to refrain from transferring employees to another jobsite because of their activities on behalf of the Union.

(c) Threatening its employees with termination because of their engagement in protected concerted activity.

(d) Instructing its employees not to discuss their wages.

(e) Informing its employees that their employment was terminated because of their activities on behalf of the Union.

(f) Interrogating its employees about ongoing Board cases.

(g) Threatening its employees with termination if the employees did not provide Respondent with information regarding ongoing Board cases.

(h) Laying off employees because they engaged in protected concerted activities to discourage employees from engaging in protected concerted activities.

(i) Discharging employees because they engaged in protected concerted activity.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative actions.

(a) Rescind the layoffs of employees Maurice Richard, Wilbert Mitchell, Richard Mitchell, and the discharge of Earin Garner.

(b) Within 14 days from the date of this Order, offer Maurice Richard, Wilbert Mitchell, Richard Mitchell, and Earin Garner full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions without prejudice to seniority or any other rights or privileges previously enjoyed. Make these employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the Remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs and discharge and within 3 days thereafter notify the employees in writing that this has been done and that the layoffs and discharge will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, per-

sonnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Metairie, Louisiana, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C., March 31, 2004.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate our employees about their concerted activities and those of their fellow employees who seek help from the International Union of Painters and Allied Trades, District Counsel 80 concerning their wages, hours, and other terms and conditions of employment.

WE WILL NOT threaten our employees with termination or with a refusal to transfer them to other jobs because of their resort to the Union.

WE WILL NOT instruct our employees not to discuss their wages.

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT interfere with the process of the National Labor Relations Board by interrogating our employees as to whether our employees resort to the Board and by threatening them with termination if they withhold information.

WE WILL NOT layoff or discharge our employees because of their engagement in protected concerted activities.

WE WILL NOT in any like or related manner interfere with you in the exercise of your rights under the National Labor Relations Act.

WE WILL rescind the unlawful layoffs of Maurice Richard, Wilbert Mitchell, and Richard Mitchell, and the unlawful discharge of employee Earin Garner.

WE WILL offer Maurice Richard, Wilbert Mitchell, Richard Mitchell, and Earin Garner reinstatement to their former jobs, or to substantially equivalent jobs if their former jobs no longer exist without prejudice to their seniority or other rights and privileges previously enjoyed by them.

WE WILL make them whole in the manner set forth in the Remedy provisions of this Decision until the date of a valid offer of reinstatement.

WE WILL expunge from our files any reference to the unlawful layoffs and discharges and will notify them in writing that this has been done and that these personnel actions will not be used against them in any manner.

LINCOLN ALEXIS, D/B/A ALEXIS PAINTING COMPANY